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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO AFFIRM OF APPELLEE THEODORE B. OLSON

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	4
I. The Act Is Unconstitutional	4
II. The Constitutional Issue Is Ripe For Adjudication	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Blair v. United States, 250 U.S. 273 (1919) 10
Community for Creative Non-Violence v. Pierce, 786 F.2d 1199 (D.C. Cir. 1986) 4
Flast v. Cohen, 392 U.S. 83 (1968) 5
Heckler v. Chaney, 470 U.S. 821 (1985) 4
In re April 1977 Grand Jury Subpoenas, 584 F.2d 1366 (6th Cir. 1978) 9
In re DiPiero, 394 F. Supp. 1350 (E.D. 1975) 10
In re Olson, 818 F.2d 34 (D.C. Cir. Indep. Counsel Div. 1987) 3
In re Patriarca, 396 F. Supp. 859 (D.R.I. 1975) 10
In re Perlin, 589 F.2d 260 (7th Cir. 1978) 9
In re Sealed Case, Misc. No. 87-00197 (D.C. Cir. Jan. 22, 1988) ..... *passim*
In re Sealed Case, 827 F.2d 776 (D.C. Cir. 1987) 9, 10
In re Subpoena of Persico, 522 F.2d 41 (2d Cir. 1975) 10
INS v. Chadha, 462 U.S. 919 (1983) 9
Muskrat v. United States, 219 U.S. 346 (1911) 5
Myers v. United States, 272 U.S. 52 (1926) 7
United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965) 4
United States v. DiGirlomo, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975) 10
United States v. Doe, 541 F.2d 490 (5th Cir. 1976) 10
United States v. Nixon, 418 U.S. 683 (1974) 1, 4
United States v. Ryan, 402 U.S. 530 (1971) 9
United States v. United States District Court, 407 U.S. 297 (1972) 2
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 5
Wayte v. United States, 470 U.S. 598 (1985) 5, 7
Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) 6

Constitutional Provisions:

U.S. Const., Art. II ..... *passim*
U.S. Const., Art. III ..... *passim*

TABLE OF AUTHORITIES—Continued

Statutes: Page

28 U.S.C. § 49 ..... *passim*
28 U.S.C. §§ 591-98 ..... *passim*

Legislative Materials:

S. Rep. No. 496, 97th Cong., 1st Sess. (1982) 5

Miscellaneous:

1 Records of the Federal Convention 64, 68 (1787) 8
Federalist 70 (Hamilton) 8

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MOTION TO AFFIRM OF APPELLEE THEODORE B. OLSON

This case presents an important but straightforward application of settled constitutional principles concerning the separation of powers. The independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (the "Act"), strip the Executive of its "exclusive authority and absolute discretion" to enforce the federal criminal laws, *United States v. Nixon*, 418 U.S. 683, 693 (1974), and place that awesome power in the hands of an official who, in name and fact, is independent of the normal protections against abuse of executive power built into the Constitution. Equally dangerously, the Act com-

promises the neutrality of the Judiciary by imposing on an Article III court the duty to appoint this prosecutor, to define the scope and responsibilities of her office, to supervise her performance, and to determine whether she may be removed and when her office should terminate.

Faced with a scheme that turns law enforcement authority over to unaccountable individuals who apply discriminatory standards of justice and carry an unavoidable bias toward prosecution, the Court of Appeals had no choice but to declare this statute unconstitutional. It merely applied "our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *United States v. United States District Court*, 407 U.S. 297, 317 (1972). This case presents "no abstract dispute concerning the doctrine of separation of powers. The rights of individuals are at stake." *In re Sealed Case*, slip op. at 88 (D.C. Cir. Jan. 22, 1988).

STATEMENT OF THE CASE

Almost two years ago, on April 23, 1986, the Independent Counsel Division of the United States Court of Appeals for the District of Columbia Circuit (the "Special Court") appointed an independent counsel to investigate two discrete aspects of approximately one hour of public, unsworn congressional testimony by appellee Theodore B. Olson, given on March 10, 1983, in his capacity as Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Mr. Olson's testimony related to the legal advice he gave to the President and other members of the Executive Branch regarding the President's assertion of an executive privilege claim.[1]

[1] There has never been any allegation that Mr. Olson's testimony sprang from a motivation that was corrupt or designed to generate personal or financial advantage of any kind.

In November 1986, after six months of her own investigation, which followed over three years of congressional and Justice Department review, independent counsel declared that Mr. Olson's testimony standing alone "probably does not constitute a prosecutable violation of any federal criminal law." [2]

The next six months of independent counsel's investigation were consumed by her efforts to expand her authority to investigate charges against two other former Justice Department officials that the Department of Justice earlier had found no basis to pursue.[3] Independent counsel's efforts to expand her jurisdiction were ultimately rebuffed both by the Attorney General and the Special Court.[4]

Thereafter, in May 1987, independent counsel served grand jury subpoenas *duces tecum* on Mr. Olson and the two individuals over whom she was denied jurisdiction. She subsequently precipitated this constitutional litigation, in June 1987, by declining to agree that Mr. Olson could preserve his constitutional challenge to the Act if he complied with the subpoena. Mr. Olson then moved to quash the subpoena.

The District Court denied the motion on July 20, 1987. On August 19, 1987, the District Court entered a stipulated order which provided that, "in order to use the only procedural mechanism for immediate appeal," Mr. Olson would be found in civil contempt for failure to furnish the subpoenaed documents. The Court of Appeals held the Act unconstitutional on January 22, 1988.

[2] *In re Olson*, 818 F.2d 34, 38 (D.C. Cir. Indep. Counsel Div. 1987) (quoting letter from independent counsel to the Attorney General).

[3] *See id.* at 47; *see In re Sealed Case*, slip op. at 78.

[4] *In re Olson*, 818 F.2d at 47.

ARGUMENT

I. The Act Is Unconstitutional.

The Court of Appeals' comprehensive 88-page opinion conclusively demonstrates that the independent counsel statute "so jeopardizes individual liberty," "so deeply invades the President's executive prerogatives and responsibilities," and so "blurs that cherished separation of prosecutor and judge," that it violates multiple protections for individual liberty guaranteed by our Constitution. *In re Sealed Case*, slip op. at 42, 74. Fundamental principles compel the conclusion that the Act violates Article II, Article III, and the Appointments Clause of the Constitution.

That the Act violates Section 3 of Article II follows inevitably from two simple propositions, the first settled by this Court and the second a truism about the Act. First, the prosecutorial function "has long been regarded as the special province of the Executive Branch, inasmuch as it is the executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).[5] With respect to criminal investigations and prosecutions, the Executive has authority that is "exclusive" and discretion that is "absolute." *United States v. Nixon*, 418 U.S. at 693.

Second, "the Ethics in Government Act's purpose and effect are to deprive the President of *any* supervisory role over the independent counsel." *In re Sealed Case*, slip op. at 68 (emphasis in original). Section 594(a) of Title 28 vests in independent counsel the "full power and independent authority" of the President to enforce federal criminal laws against selected individuals, and § 597 explicitly preempts the Executive's entire authority over any matter in the independent counsel's prosecutorial jurisdiction. This office was created for the specific purpose of being "free from . . . the control of the Executive Branch." S. Rep. No. 496, 97th Cong., 1st Sess. 2 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News, 3537-38. Thus, the Act restricts each component of the Executive's prosecutorial authority—appointment, supervision, and removal. Stripping the Executive of prosecutorial power entrusted to it by Article II is, by definition, unconstitutional.

The Act's immersion of the Judiciary in matters of prosecutorial discretion constitutionally entrusted to the Executive conflicts with the core requirement of Article III that courts must "abstain from exercising any power that is not strictly judicial in character and which is not clearly confided to it by the Constitution." *Muskrat v. United States*, 219 U.S. 346, 355 (1911). The strict jurisdictional limitation of Article III "defines the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'" *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). Decisions about whom and what to investigate and prosecute are "not readily susceptible to the kind of analysis courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985).

The Act runs roughshod over these bedrock principles. As even the dissent below recognized, the Special Court has the power not only to make "ad hoc appointments" of independent counsel but also to "defin[e] her office and responsibilities," including her prosecutorial jurisdiction, and to review her removal. *In re Sealed Case*, slip op. at 37 & n.46, 24-28 (Ginsburg, J., dissenting). The Act

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[5] *Accord, e.g., Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, and when to prosecute, lies at the *core* of the Executive's duty to see to the faithful execution of the laws") (emphasis added); *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935 (1965).

gives the Special Court open-ended supervisory authority over the ongoing course of independent counsel investigations. *In re Sealed Case*, slip op. at 80-81, 86-87.

Finally, the Act violates the Appointments Clause of Article II by depriving the President of his constitutional power to appoint superior officers with the advice and consent of the Senate. The Appointments Clause requires "Officers of the United States" to be appointed by the President, except for "inferior" officers who may be otherwise appointed. Any single official exercising the full prosecutorial authority of the United States is clearly a superior officer. Independent counsel cannot be an inferior officer because she has no superior: if the Judiciary is her superior, then even the dissent below admits that Article III boundaries are breached (*In re Sealed Case*, slip op. at 19 n.18); if Congress is her superior, then Congress has unconstitutionally assigned itself prosecutorial functions, and at the expense of the Executive; the Executive cannot be her superior because the Act deliberately insulates her from Executive control. Even if independent counsel is deemed an "inferior" officer, it is incongruous and unconstitutional for an officer performing such a core executive function as the prosecution of criminal offenses to be appointed by an entity outside the Executive Branch. *In re Sealed Case*, slip op. at 23.

This reassignment of the Executives' prosecutorial power by the Ethics in Government Act poses a unique threat to individual liberty. "Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor 'has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.'" *In re Sealed Case*, slip op. at 24, quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2141 (1987).

As the Court of Appeals recognized, the independent counsel process creates an inevitable bias toward indictment,[6] subjects government officials to a discriminatory standard of justice,[7] and deprives independent counsel of the institutional perspective that separates inconsequential matters from those of law enforcement significance.[8] These problems directly result from the fragmentation and dispersal of Executive functions and the lack of accountability to any elected official.[9] The Framers

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[6] *In re Sealed Case*, slip op. at 70-71 ("A person occupying this statutory office has, it seems to us, unique incentives to seek an indictment. . . . In effect, an entire self-sufficient government agency is created from scratch to investigate and perhaps prosecute a single individual. . . . The independent counsel is thus 'subject to formidable public—and perhaps self-imposed—pressure to indict in the one case he was appointed to pursue.'") (quoting former Attorney General Edward H. Levi).

[7] *Id.* at 73-74, 57 ("The consequence of this scheme . . . is that targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen and therefore it strikes at the very heart of the unitary executive doctrine, which has as a primary purpose the 'unitary and uniform administration of the laws.'") (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

[8] *Id.* at 72 ("Wise exercise of prosecutorial discretion is dependent in part upon access to officials who are participants in the ongoing process of enforcing the law and who are able to take a longer view of an individual case. Yet the independent counsel is cut off from the accumulated lore and wisdom of career Department of Justice officers, who are in a unique position to evaluate '[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan.'") (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

[9] *Id.* at 27-28 ("The Framers provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people. . . . Not merely an abstract idea of political theory, the President's accountability is a hallmark of our democracy—perhaps best put in President Truman's gritty aphorism

foresaw, and intended to prevent, this danger through "unity in the Executive" as "the best safeguard against tyranny." [10]

Equally important, the Act deprives the subject of the investigation of the opportunity to have these and other issues adjudicated by a truly neutral judiciary totally divorced from the prosecutor.[11] Judicial participation in prosecutorial decisions necessarily undermines the courts' ability to act as a check on improper applications of prosecutorial discretion. The decision below details the ways in which the Special Court has unilaterally protected its prosecutorial proteges without even the benefit of adversarial proceedings. *In re Sealed Case*, slip op. at 77-87. The Act has caused precisely the loss of neutrality that Article III is intended to prevent.

Independent counsel complains that this Court's decisions "provide less than clear guidance" about separations of powers principles.[12] Assigning, consistent with our tripartite system of government, powers that cannot

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'The buck stops here.' For no federal government function is it more vital to the protection of individual liberty that ultimately the buck stop with an accountable official—the President—than in the prosecution of criminal laws.").

[10] 1 Records of the Federal Convention 64, 68; Federalist 70 (Hamilton).

[11] *In re Sealed Case*, slip op. at 86 (the Act "implicates the course of a federal criminal investigation, which, if there were an indictment, must necessarily come before the federal courts for trial and, in all likelihood, appeal. In any such trial or appeal, the defendant may wish to call the court's attention to misconduct by the independent counsel or by the independent counsel's superior, who, as we have shown, in practical terms is the Special Court. This can raise an obvious dilemma for a defendant who may be impelled to engage in subtle calculations concerning the possibility of offending the court by pointing too vigorously to alleged overreaching by fellow judges or by an officer appointed by and supervised by fellow judges.").

[12] Jurisdictional Statement, at 28 (filed Feb. 1, 1988).

easily be categorized as executive, legislative or judicial may present difficulties in some cases, but this case is far from the margin. Not only does this statute strip the Executive of the core function of criminal law enforcement, but it transfers that responsibility to the Judiciary, compromising its neutrality and thrusting upon it Executive powers consistently found judicially unreviewable.

At bottom, the asserted justification for this radical restructuring of the law enforcement function is the claimed need to take away from the Executive the power to enforce the law as to a class of Executive Branch officials in order to protect against potential abuses of Executive power. But "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS v. Chadha*, 462 U.S. 919, 959 (1983).

II. The Constitutional Issue Is Ripe For Adjudication.

Independent counsel's argument that this constitutional claim is not ripe for adjudication is neither timely nor meritorious. As the Court of Appeals held, the ripeness claim is non-jurisdictional and therefore was waived by independent counsel's failure to raise it in the District Court. *In re Sealed Case*, slip op. at 9 n.6. In any event, independent counsel's ripeness argument is foreclosed by this Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971)—a decision that "could scarcely be clearer or more on point." *In re Sealed Case*, 827 F.2d 776, 778 (D.C. Cir. 1987) Each court that has been asked to adjudicate a challenge to a grand jury subpoena based on the authority or bias of the prosecutor conducting the investigation has reached the merits of the challenge.[13]

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[13] *Id.* at 778-79, citing *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1369 (6th Cir. 1978); *In re Perlin*, 589 F.2d 260

Blair v. United States, 250 U.S. 273 (1919), does not conflict with these consistent holdings. *Blair* simply precludes a witness who is not a target from attacking the constitutionality of a criminal statute based on "the sheerest speculation" that the statute "would ever have a direct impact on the contemnor." *In re Sealed Case*, 827 F.2d at 779. Here, the independent counsel statute would have a direct and inescapable impact on Mr. Olson if he were forced to comply with a subpoena obtained by an institutionally unaccountable and biased prosecutor whose very existence violates Articles II and III.

CONCLUSION

Fully aware of the importance of its action, the Court of Appeals held an Act of Congress unconstitutional. Its decision reflects painstaking deliberation and analysis. Its judgment is manifestly correct and should be affirmed.

Respectfully submitted,

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